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In The

Supreme Court of the United States

October Term, 1985

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, NORTH CAROLINA BOARD OF TRANSPORTATION, and JAMES E. HARRINGTON, as Secretary of the North Carolina Department of Transportation and Chairman of the North Carolina Board of Transportation,

Petitioners,

v.

CREST STREET COMMUNITY COUNCIL, INC., RESIDENTS OF CREST STREET COMMUNITY, and SAVE OUR CHURCH and COMMUNITY COMMITTEE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

Page

Statement of Case 1

Summary of Argument 8

Argument 14

I. Section 1988 Explicitly Authorizes Respondents' Recovery Of Attorney's Fees For Representation In The Federal Title VI Administrative Proceeding In This Case. 14

A. The Federal Title VI Administrative Proceeding In This Case Was A "Proceeding" Within The Meaning Of Section 1988. 15

1. Agency Administrative Proceedings Are Included Within The Phrase "Action Or Proceeding" In Section 1988, As Established By The Statutory Language, This Court's Holding In *Carey* And The Legislative History. 15

2. The Actions Before The Agency In This Case Constituted An Agency Administrative Proceeding. 27

B. The Federal Administrative Proceeding In This Case Was One "To Enforce . . . Title VI." 33

C. Respondents Were A "Prevailing Party" In The Federal Title VI Administrative Proceedings. 34

D. Awarding Attorney's Fees In This Case Furthers The Congressional Goals Of Section 1988 Of Assisting The Enforcement Of Civil Rights And Encouraging The Settlement Of Civil Rights Disputes. 40

II. Attorney's Fees For Administrative Representation May Be Recovered In An Independent Court Action. 46

Conclusion 50

TABLE OF AUTHORITIES

Page

CASES

Arriola v. Harville, 781 F.2d 506 (1986) 35

Cannon v. Univ. of Chicago, 441 U.S. 677 (1979) 41

Conner v. Finch, 431 U.S. 407 (1977) 35

Crawford v. University of North Carolina, 440 F. Supp. 1047 (M.D.N.C. 1977) 19

Derheim v. Bur. of Soc. Serv., 524 F.Supp. 1321 (D. Minn. 1981), aff'd on other grounds, 688 F. 2d 66 (8th Cir. 1982) 47

Dunn v. United States, 442 U.S. 100 (1979) 29

Dupree v. City of Chattanooga, Tenn., 362 F.Supp. 1136 (E.D. Tenn. 1973) 19

ECOS, Inc. v. Brinegar, No. C-352-D-72 (M.D.N.C. Feb. 20, 1973) 4, 5, 7, 8, 14, 48, 49

EEOC v. Ford, 458 U.S. 219 (1982) 32

Estes v. Tuscaloosa County, 696 F.2d 898 (11th Cir. 1983) 47

Evans v. Jeff D., 54 U.S.L.W. 4359 (U.S. April 21, 1986) 32, 42

Feliciano v. Ramsey, 363 F.Supp. 656 (S.D.N.Y. 1973) 19

Garcia v. United States, 105 S.Ct. 479 (1984) 21

Green v. Cauthen, 379 F.Supp. 361 (D.S.C. 1974) 19

Haroco, Inc. v. Am. Nat'l Bank and Trust Co. of Chicago, 747 F.2d (1984), aff'd 105 S.Ct. 3291 (1985) 20

Hensley v. Eckerhart, 461 U.S. 424 (1983) 17, 23

Horacek v. Thone, 710 F.2d 496 (8th Cir. 1983) 47

Marek v. Chesney, 105 S.Ct. 3012 (1985) 32

TABLE OF AUTHORITIES—Continued

Page

Monell v. N.Y. City Dept. of Social Services, 431 U.S. 658 (1976) 47

Moor v. County of Alameda, 411 U.S. 693 (1973) 47, 48

NAACP v. Wilmington Medical Center, 599 F.2d 1247 (3d Cir. 1979) 41

Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) 44

New York Gaslight Club v. Carey, 447 U.S. 54 (1980) ..... *passim*

Parker v. Matthew, 411 F.Supp. 1059 (D.D.C. 1976) 19

Rice v. United States, 356 F.2d 709 (8th Cir. 1966) 28, 29

Sedima, S.P.R.L. v. Imrex, 105 S.Ct. 3275 (1985) 20, 21

Smith v. Robinson, 104 S.Ct. 3457 (1984) 24, 26

United Parcel Service v. Mitchell, 451 U.S. 56 (1981) 35

United States v. Abrams, 427 F.2d 86 (3d Cir. 1970), cert. denied, 400 U.S. 832 (1970) 29

United States v. Browning, 572 F.2d 720 (10th Cir. 1978), cert. denied, 439 U.S. 822 (1978) 28, 29

United States v. Fruchtman, 421 F.2d 1019 (6th Cir. 1970) 29

United States v. Sutton, 732 F.2d 1483 (10th Cir. 1984), cert. denied, 105 S.Ct. 903 (1985) 29

United States v. Vixie, 532 F.2d 1277 (9th Cir. 1976) 29

Webb v. Board of Educ. of Dyer County, 105 S.Ct. 1923 (1985) 23, 24, 25, 26, 49

Zuber v. Allen, 396 U.S. 168 (1969) 21

TABLE OF AUTHORITIES—Continued

Page

LEGISLATIVE HISTORY

122 Cong. Rec. (1976): p. 32933 18

122 Cong. Rec. (1976): p. 35124 21

H.R. Rep. No. 1558, 94th Cong., 2d Sess. (1976) 19, 22, 31

S. Rep. No. 1011, 94th Cong. 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908 ..... *passim*

MISCELLANEOUS

Blacks Law Dictionary 1083 (5th ed. 1979) 15, 16, 19

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Burger "Isn't There a Better Way?" 68 *ABA J.* 274 (1982) 41

U.S. Bureau of the Census, *Statistical Abstract of United States: 1986 Series P-60 nos. 147 and 149* (1986) 44

REGULATIONS

29 C.F.R. Pt. 1601 32

29 C.F.R. Pt. 1601: § 1601.12 36

29 C.F.R. Pt. 1601: § 1601.80 37

29 C.F.R. Pt. 1613.217 (a) and (c) 33

49 C.F.R. Pt. 21 ..... 2, 33

49 C.F.R. Pt. 21: § 21.1 33

49 C.F.R. Pt. 21: § 21.11(d)(1) 3

49 C.F.R. Pt. 21: § 21.13(a) 3

9 NYCRR § 465.3(a)(3) 36

9 NYCRR § 465.4(b) 37

TABLE OF AUTHORITIES—Continued

Page

STATUTES

9 NYCRR § 465.5(a) 37

9 NYCRR § 465.5(d)(2)(v) 38

9 NYCRR § 465.7(e) 38

5 U.S.C. § 504 32

5 U.S.C. § 504(a)(i) 33

18 U.S.C. § 1505 ..... 27, 28, 29

18 U.S.C. § 1961-1968 20

20 U.S.C. § 1400 *et seq.* 26

23 U.S.C. § 109 3

24 U.S.C. § 128 4

24 U.S.C. § 138 4

28 U.S.C. § 2412(d)(3) 32

42 U.S.C. § 1983 ..... 25, 26, 47, 48

42 U.S.C. § 1988 ..... *passim*

42 U.S.C. § 2000d-1 ..... 3, 30, 33

Civil Rights Act of 1964 sec. 603, 42 U.S.C. § 2000d-2 22

42 U.S.C. § 2000e-5(b) 30

Civil Rights Act of 1964 sec. 706(f)(1), 42 U.S.C. § 2000e-5(f)(1) 43

Civil Rights Act of 1964 sec. 706(k), 42 U.S.C. § 2000e-5(k) 16, 17, 18, 24

42 U.S.C. § 2000e-5(k) 16

42 U.S.C. § 3601 3

42 U.S.C. § 4331 3

TABLE OF AUTHORITIES—Continued

	Page
42 U.S.C. § 4332	4
49 U.S.C. § 1653(f)	4
Mass. Ann. Laws ch. 151B, § 5 (Michie/Law Co-op 1986)	39
N.H. Rev. Stat. Ann. ch. 354-A :9 (1984)	39
Rules	
Rule 7410(i) California Fair Employment and Housing Commission Rules of Procedure	38
Rule 7421(d) California Fair Employment and Housing Commission Rules of Procedure	36
Rule 7445(a) California Fair Employment and Housing Commission Rules of Procedure	37
Rule 10.8(A)(2), Colorado Civil Rights Commission Rules of Procedure	39
Rule 31-125-16 Connecticut Commission on Human Rights and Opportunity Rules of Procedure	38
Rule 1.3(2) Iowa Civil Rights Commission Rules of Procedure	37
Rule 2.08(c), Maine Human Rights Commission Rules of Procedure	38
Rule .01(G), Maryland Commission on Human Relations Rules and Procedures	39
Rule 5000.0800(3) Minnesota Department of Human Rights Rules of Procedure	38
Rule 4 CSR 180-2.030, Missouri Commission on Human Rights Rules of Procedure	39

STATEMENT OF THE CASE

This case presents the issue of whether attorney's fees may be recovered under 42 U.S.C. Section 1988 for representation in a federal Title VI administrative proceeding. In this case respondents were the primary prosecuting parties in a lengthy, contested, federal Title VI administrative proceeding. The repeated factual claim by amicus, who did not participate in the administrative proceeding, that respondents played a limited, peripheral role in an informal setting is incorrect and does not provide an accurate factual basis for the adjudication of this case (*See, e.g.* Am.Br. 11). Therefore, it is necessary for respondents to set forth the following statement of the case.

Respondents are civic and church organizations representing the Crest Street Community, a long-established, cohesive, black neighborhood in Durham, North Carolina.[1] For many years petitioner North Carolina Department of Transportation[2] proposed extending a freeway through the Crest Street Community with a major interchange in the midst of the community (J.A. 68-69). The proposed extension was a federal-aid highway project with 75% of the costs to be paid by federal funds (J.A. 57). The administrative proceeding in this case concerned respondents' complaint that their rights under Title VI were being violated by petitioners' planning and construction of this federally funded freeway.

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1. The Residents of Crest Street Community and the Save Our Church and Community Committee are unincorporated associations representing the interests of the residents of Crest Street Community and the New Bethel Missionary Baptist Church, which is located within the Crest Street Community. In 1980 the Crest Street Community Council, Inc. was incorporated and assumed the functions of these two associations. Other than this affiliation, there are no parent companies, subsidiaries or affiliates of the Crest Street Community Council, Inc.

2. The other petitioners are the governing board and officials of the North Carolina Department of Transportation.

As proposed, extension of the freeway would have destroyed the Crest Street Community; the freeway right of way would have displaced the community church and park and more than half of the residents, and the remaining residents would have been isolated in fragments likely to be quickly consumed by commercial development (J.A. 68-69).

For several years plans for the extension remained dormant; then, in 1976, petitioners resumed active planning for the project (J.A. 56, 68). In March 1977, respondents retained the North Central Legal Assistance Program to represent them concerning petitioners' planning and construction of the freeway and remedial efforts to mitigate the adverse impact of the project[3] (J.A. 69). During 1977 and 1978, respondents expressed their opposition to construction of the freeway through the Crest Street Community, but petitioners proceeded with issuing a revised draft Environmental Impact Statement for the project (J.A. 57).

After petitioners issued this revised draft Environmental Impact Statement, respondents, in September 1978, filed an administrative complaint with the United States Department of Transportation (USDOT), pursuant to USDOT's Title VI regulations, 49 CFR Section 21 *et seq.* (J.A. 70). The complaint alleged that petitioners' actions violated Title VI and sought rejection of petitioners' revised Environmental Impact Statement and prohibition of further planning or construction of the project until petitioners complied with Title VI[4] (J.A. 88-89).

3. The North Central Legal Assistance Program, a nonprofit corporation which is funded by the Legal Services Corporation, provides legal representation to low-income persons.

4. The primary claims in the complaint were under Title VI. The complaint also challenged the project under the Na-

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USDOT investigated the administrative complaint, conducting a field investigation, meeting with petitioners' staff and with respondents, and receiving extensive documents from petitioners and respondents (J.A. 58). On February 20, 1980, USDOT issued a preliminary finding of reasonable cause that construction of the freeway as proposed in petitioners' revised Environmental Impact Statement would constitute a prima facie violation of Title VI and USDOT Title VI regulations (J.A. 97-99).

USDOT urged petitioners and respondents to attempt to mediate the issues raised by the administrative complaint and accordingly, such negotiations were begun[5] (J.A. 108). Respondents carried out the negotiations in support of the administrative complaint, advising USDOT of the progress. (*See*, letters from respondents' counsel to USDOT. *In* Documents received by petitioners under the Freedom of Information Act and filed with the district court (hereinafter "FIAR"), 206-07, 212, 213-14.) After twenty separate negotiation sessions occurring over a period of fifteen months, respondents and petitioners, in February 1982, reached a preliminary agreement on resolution of the administrative complaint and negotiations continued toward a final agreement (J.A. 37-48, 58-59)[6].

While negotiations continued, petitioners moved, in August 1982, to dissolve an order enjoining construction of

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tional Environmental Policy Act, 42 U.S.C. Section 4331, the Federal-Aid Highway Act, 23 U.S.C. Section 109 and Title VIII of the Civil Rights Act of 1968 (fair housing), 42 U.S.C. Section 3601.

5. See 42 U.S.C. Section 2000d-1 and 49 C.F.R. Sections 21.11(d)(1) and 21.13(a) regarding conciliating Title VI complaints.

6. The City of Durham also participated in these negotiations, with an expectation of acting functionally as petitioners'

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the freeway, entered in *ECOS, Inc. v. Brinegar*, No. C-352-D-72 (M.D. N.C. Feb. 20, 1973)[7] (J.A. 71). Respondents and Willie Patterson, a Crest Street Community resident, moved to intervene in the *ECOS* action and filed a proposed complaint asserting the Title VI violations and other claims raised in the administrative complaint. *Id.*[8]

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agent in implementing the ultimately agreed upon Mitigation Plan. Under the plan the City was released by petitioners from the requirement to pay part of the right of way costs on the condition that the City use these monies along with Community Development Block Grant funds to help carry out the Mitigation Plan.

7. In the *ECOS* action, several organizations and individuals challenged construction of part of the freeway, including the portion proposed through the Crest Street Community, alleging violations of the Federal-Aid Highway Act, 24 U.S.C. Section 128, 138. 49 U.S.C. Section 1653(f) (parkland preservation) and the National Environmental Policy Act of 1969, 42 U.S.C. Section 4332. Petitioners were enjoined from taking steps toward construction of this section of the freeway until petitioners complied with these statutes.

8. During negotiation of the settlement of the administrative complaint petitioners and respondents agreed that respondents would not oppose Federal Highway Administration approval of the EIS while negotiations were still ongoing, on the condition that the EIS would not be submitted to the federal court for approval until the settlement was concluded. *See*, Res. App. 2-3 N. C. Dept. of Transportation memorandum regarding meeting with respondents: "The state would have to agree not to present the EIS to the Court until the details of the [mitigation] plan had been worked out and the residents had been informed of their specific options and approved the plan. Bill Caddell, (Assistant State Highway Administrator) said that he saw no problem with handling the plan in that manner." Respondents subsequently confirmed this agreement in a letter to petitioners: " . . . a document setting out the details of the mitigation plan will be prepared and agreed upon by the parties prior to submission of the environmental impact statement to the federal court." (Res. App. 4 [letter from Michael D. Calhoun to William F. Caddell, Jr. and Barry L. DelCastilho, dated June 11, 1982].) Petitioners' records show that the letter was received: "June 14—Received letter from Crest St. At-

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While respondents' motion for intervention was pending, respondents continued negotiations with petitioners. After an additional twenty two and one-half hours of negotiations in six separate sessions, the parties agreed upon a Final Mitigation Plan and the City of Durham and petitioners agreed upon a Municipal Agreement setting out the respective duties of petitioners and the City in implementing the Mitigation Plan (J.A. 51, 52, 71). The Final Mitigation Plan recites that respondents agreed to withdraw their administrative complaint and support dissolution of the *ECOS* injunction in exchange for petitioners' and the City's agreement to implement the Final Mitigation Plan (J.A. 109).

On December 14, 1982, the district court entered a consent judgment in the *ECOS* action. The judgment recites that petitioners and respondents had resolved their dispute by agreement (the Final Mitigation Plan) (J.A. 155). The judgment dissolved the injunction, dismissed the ac-

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torney confirming agreement reached on mitigation plan . . . ." (Res.App. 6) [N. C. Dept. of Transportation file memorandum]. Notwithstanding this confirmed agreement, petitioners unexplainedly submitted the EIS to the court prior to settlement of the administrative complaint. It was this action which triggered respondents' motion to intervene. These documents were not presented to the district court below because petitioners did not contest respondents' status as prevailing parties in the *ECOS* action. Rather, petitioners filed a motion to dismiss based on other grounds (J.A. 158-9). The district court improperly treated this motion to dismiss as a motion for summary judgment and an attack on respondents' status as prevailing parties in the *ECOS* action without notice to respondents that it was doing so. These documents are pointed out now to show that the district court's error was prejudicial to respondents and, if there is any doubt as to respondents' status as prevailing parties in the *ECOS* action and this status affects the determination of this case, the case should be remanded for determination of this status. (Respondents previously raised this issue before the Court of Appeals (Appellants' Brief, 23-30).).

tion and dismissed with prejudice, respondents' Title VI and other claims, conditioned on petitioners' implementing the Final Mitigation Plan[9] (J.A. 153-57). The following day formal execution of the Final Mitigation Plan and Municipal Agreement by respondents, petitioners and the City of Durham took place at a public ceremony (J.A. 71). USDOT was not a party to the consent judgment or the Final Mitigation Plan settlement agreement (J.A. 153-57, 71).

Under the terms of the Final Mitigation Plan, the respondents were accorded substantial relief. First, the petitioners moved the right of way for the freeway and modified the design of the interchange in the Crest Street Community so as to preserve the community church and park and to provide sufficient land for a new community site. Second, a new community was developed on a tract consisting of part of the old community and land immediately adjacent to it. This allowed the community to remain intact. In the new community housing, streets and recreational facilities are dramatically improved. Most of the relief accorded to respondents was provided by the petitioners. The petitioners released the City of Durham from its obligation to pay an estimated 2.75 million dollars for right of way costs for the freeway, on the condition that the City use these and additional funds in the mitigation efforts.[10] In addition, the petitioners provided direct benefits to respondents, above and beyond regular relocation benefits, at an estimated cost of more than three million dollars (Pet.App. 26-27).

9. Petitioners assert in their statement of the case that "The application for intervention was not allowed. . . ." (Pet. Br. 6) This assertion is incorrect. The district court did not specifically rule on the intervention motion. The intervenors, though, became parties by virtue of the consent judgment, which both petitioners and respondents signed. The consent judgment adjudicated the claims between petitioners and respondents, dismissing with prejudice respondents' Title VI and other claims, conditioned upon petitioners' implementation of the Final Mitigation Plan (J.A. 153-57).

Both the Final Mitigation Plan and the *ECOS* Consent Judgment specifically reserved respondents' claim for attorney's fees (J.A. 129, 155). Respondents subsequently submitted to the petitioners a request for payment of attorney's fees, accompanied by a detailed listing of expenses and hours (J.A. 59-60). This request was denied by petitioners and respondents filed this action on November 30, 1983, to recover the requested attorney's fees and expenses (J.A. 3, 59-60).

The action came before the District Court on respondents' motion for summary judgment and petitioners' motion to dismiss[11] (J.A. 66-159). The district court denied respondents' claim for fees for the Title VI federal administrative proceeding because the court concluded that Section 1988 did not authorize fees for administrative proceedings (Pet.App. 36). The district court also denied respondents' claim for fees for the *ECOS* action because the court concluded that the respondents were not prevailing parties in that litigation.[12] *Id.* at 266.

10. The City had previously tried to spend substantial Community Development Block Grant funds in the Crest Street Community but HUD blocked the use of the funds due to petitioners' plans to build the freeway through the community (FIAR 85-89).

11. Petitioners filed a motion to dismiss, which the district court treated as a motion for summary judgment, though the district court did not give notice to respondents that it was doing so. As explained *supra* at 4-5 n.8, respondents were prejudiced by this error.

12. The district court reached this conclusion notwithstanding that petitioners in their motion to dismiss did not con-

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The Court of Appeals reversed, finding, that Section 1988 did apply to administrative proceedings and that respondents' claim was explicitly authorized by Section 1988 (Pet.App. 8). The court found that respondents were " 'prevailing parties' in a 'proceeding to enforce . . . title VI of the Civil Rights Act of 1964' " within the meaning of Section 1988 (Pet.App. 7). The court remanded the action to the district court for a determination of the amount of attorney's fees (Pet.App. 21).

Petitioners and respondents subsequently agreed that $98,571.63 was a reasonable amount of fees under the Court of Appeals' order and the parties executed a consent judgment to this effect, which was entered by the district court on February 7, 1986.[13]

SUMMARY OF ARGUMENT

Respondents' claim for attorney's fees for representation in a federal Title VI administrative proceeding is explicitly authorized by Section 1988. Section 1988 provides for attorney's fees for a "prevailing party" in an "action or proceeding to enforce . . . title VI of the Civil Rights Act of 1964." Respondents meet all of these requirements and thus they are entitled to recover attorney's fees.

First, respondents meet the requirement that the representation for which they seek fees occur in an "action of proceeding." The statutory language of Section 1988,

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tend that respondents were not prevailing parties in the *ECOS* action. The petitioners' motion to dismiss raised only the following defenses: lack of jurisdiction; Eleventh Amendment immunity; failure to state a claim; lack of standing; and failure to exhaust administrative remedies (J.A. 159-160).

13. The judgment is, of course, contingent upon this Court's action in the case.

this Courts' holding in *New York Gaslight Club v. Carey*, 447 U.S. 54 (1980), and the legislative history of Section 1988 establish an administrative proceeding is a "proceeding" within the meaning of Section 1988. Furthermore, the actions before the agency in this case constituted a "proceeding" within the meaning of Section 1988.

Beginning with the statutory language enacted by Congress, the language in Section 1988 is broad, providing for fee recoveries in "any action or proceeding." This Court in *Carey*, viewing identical language in the Title VII attorney's fees provision upon which Section 1988 was patterned, found that these words evidenced a clear Congressional intent to authorize the recovery of attorney's fees for representation in administrative proceedings. The legislative history of Section 1988 confirms that Congress likewise meant what it said when it enacted Section 1988. During the debate on Section 1988, Senator Helms, who helped lead the opposition to the bill, offered a printed amendment to reduce the coverage of the bill by deleting the words "or proceedings." The amendment was defeated by a wide margin in a recorded vote. None of the legislative history evidences a Congressional intent to nullify the word "proceeding." The legislative history does generally refer to court actions and suits in court, but these references merely reflect the fact that court actions are the most typical means of enforcing civil rights and therefore it is to be expected that these would be the terms used in the legislative discussion. Finally, if there was any doubt as to the meaning of Section 1988, in the Senate Report Congress specifically directed the courts to apply Section 1988 broadly. Thus, through the statutory language and the legislative history Congress manifested its intent to include administrative proceedings within the coverage of Section 1988.

Moreover, in this particular case the actions before the administrative agency constituted a "proceeding" within the meaning of Section 1988. The actions spanned a period of more than four years and included: respondents' filing a detailed formal complaint with the agency; a formal investigation by the agency; a finding of probable cause that Title VI was violated; extensive negotiations between respondents and petitioners; and execution of a formal settlement document, which resolved the complaint. These actions fall within the usual meaning of the word proceeding, which includes all procedures used by the agency to carry out its statutory duties and is not limited to agency hearings. Furthermore, the requirement in Title VI that the agency attempt to conciliate the dispute before implementing involuntary enforcement orders does not change the normal meaning of the word proceeding and does not limit fee awards for Title VI administrative proceedings to cases which are not resolved through conciliation, but rather require an agency hearing. Limiting the application of Section 1988 in this way would contradict this Courts' analysis in *Carey*. This Court in *Carey*, construing Title VII, which also mandates conciliation, found that the agency proceeding encompassed procedures prior to the hearing stage, including the agency investigation and the conciliation efforts. Limiting fee awards to cases in which agency hearings are held also would contradict the directive in the legislative history of Section 1988 to encourage settlements by awarding fees to those who obtain relief through prehearing settlements.

Respondents further meet the requirement of Section 1988 that the proceeding for which they seek fees be one "to enforce the provisions . . . of title VI of the Civil Rights Act of 1964 . . ." Title VI mandated that all agencies promulgate regulations to enforce Title VI. The agency procedures in this case were carried out under regulations specifically issued pursuant to Title VI and the primary issue in this administrative proceeding was respondents' claim that petitioners were violating respondents' rights under Title VI.

Respondents also meet the final requirement of Section 1988 that they be a "prevailing party." First, respondents meet the requirement that they be a "party." Petitioners have never contested, in either the courts below or in this Court, the fact that respondents were a party in the administrative proceeding. Usually this Court does not even consider a matter, such as *amicus'* assertion that respondents were not parties to the administrative proceeding, unless it was brought forward *both* in the courts below and in the petition to this Court. However, if the Court chooses to consider amicus' argument, it is clear that respondents were in fact not only a party to the administrative proceeding, but with the agencies' encouragement, they were the primary prosecuting party in the proceeding. Respondents initiated the administrative proceeding by the filing of their complaint, which set out in detail the legal and factual bases of the Title VI violation. They provided the agency with extensive materials which documented the violation. Then, after the finding of a probable Title VI violation, the respondents carried out the negotiations on behalf of the complaint and drafted the settlement document, advising the agency of the progress of the negotiations. Finally, it was respondents who signed with petitioners the settlement document, which resolved the complaint and concluded the administrative proceeding; the agency itself did not sign the settlement document. The events in this case show that both the agency and petitioner accorded party status to respondents.

While complainants under the Title VI regulations in this case may have limited procedural rights, such limitations also apply to complainants under the federal Title VII regulations and complainants under the state Title VII agency regulations, complainants which this Court in *Carey* found were parties for purposes of the attorney's fee provision. Under both Title VI and Title VII the agency performs a dual function, enforcing both the civil rights of the complainant and the broader public interest, as the agency perceives it. These limitations on complainants' procedural rights insure that if the goals of the complainant and the agency conflict, the agency can pursue its goals, though frequently, as in this case, there will be no conflict. These procedural limitations do not, just as they did not in *Carey,* disqualify respondents from recovering attorney's fees. Respondents also meet the further requirement that they be the party who prevailed. The settlement document shows, and petitioners concede, that respondents recovered substantial relief as a direct result of respondents' efforts in the administrative proceeding.

Thus, as shown above, Section 1988 explicitly authorizes respondents' recovery of attorney's fees, for respondents meet all of the requirements of the statutory language of Section 1988. Moreover, awarding attorney's fees in cases such as this one not only carries out the statutory language of Section 1988, it also furthers the Congressional goals of assisting the enforcement of civil rights encouraging the settlement of civil rights disputes, which both Congress and this Court have strongly endorsed. First, Congress found that attorney's fees were an essential part of the remedy for civil rights violations, for otherwise victims of discrimination would be unable to secure attorneys to enforce their civil rights. This case demonstrates well

the need for such attorneys for it is unlikely that respondents' civil rights would have been enforced in the administrative forum without the assistance of an attorney. Providing attorneys for complainants also assists the civil rights enforcement efforts of agencies, which typcially have very limited resources. As shown in this case, complainants' attorneys can provide valuable assistance in documenting civil rights violations and, perhaps most importantly, in conciliating disputes. Complainants are much more likely to agree to settlements, which reduce the workload of the federal courts, if complainants are secure that their rights have been protected by their own attorney. Settlements are also encouraged because the party charged with discrimination faces the possibility of having to pay to the complainant an attorney's fee award. The possibility of such an award enhances the prospect that the party will earnestly explore settlement prospects at the earliest opportunity.

Finally, as a matter of procedure complainants must be able to bring an independent court action for the recovery of attorney fees for administrative representation. To hold otherwise would make the recovery of such fees dependent on whether by happenstance the case required the complainant to bring a federal court action on the civil rights claim itself. It would also mean that the complainant who was successful in the administrative forum would be denied fees while the unsuccessful administrative complainant who did not prevail until after a federal court action would recover fees. This Court in *Carey,* considering this same issue under Title VII, specifically authorized an independent action to recover administrative fees, finding that a contrary holding would produce an anomalous and unacceptable result.

ARGUMENT

I. SECTION 1988 EXPLICITLY AUTHORIZES RESPONDENTS' CLAIM FOR ATTORNEY'S FEES FOR REPRESENTATION IN A TITLE VI FEDERAL ADMINISTRATIVE PROCEEDING AND A RELATED FEDERAL COURT ACTION.

This case presents a simple issue. Respondents' claim for attorney's fees for representation in a Title VI federal administrative proceeding falls explicitly within the fee authorization of 42 U.S.C. Section 1988.[14] Congress amended Section 1988 by enacting The Civil Rights Attorney's Fee Award Act of 1976 which added the following fee authorization:

> In any action or proceeding to enforce a provision of Sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318 or title VI of the Civil Rights Act of 1964, the court in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. 42 U.S.C. Section 1988.

Section 1988, as the court of appeals below concluded, explicitly covers respondents' claim for attorney's fees: "Respondents have demonstrated they were 'prevailing parties' in a 'proceeding . . . to enforce title VI of the Civil Rights Act of 1964.' " (Pet.App. 8).

As is shown in the following subsections, respondents meet all of the requirements of Section 1988, specifically: (A) the federal administrative proceeding for which respondents seek fees was a "proceeding" within the meaning of Section 1988; (B) the federal administrative proceeding was one "to enforce . . . title VI"; and (C) respondents were a "prevailing party" in the federal Title VI administrative proceeding. Furthermore, it will be shown that awarding attorney's fees for representation in federal Title VI administrative proceedings such as this one not only carries out the statutory language of Section 1988, it also furthers the Congressional goals of Section 1988 of assisting the enforcement of civil rights and encouraging the settlement of civil rights claims.

14. Respondents' fee claim also includes time spent on a motion to intervene in and the settlement of the *ECOS* court action. As found by the Court of Appeals these hours are also compensable. They are discussed *infra* at 48-49.

A. The Federal Title VI Administrative Proceeding In This Case Was A "Proceeding" Within The Meaning of Section 1988.

Respondents meet the requirement of Section 1988 that the representation for which they seek attorney's fees be representation in an "action or proceeding" within the meaning of Section 1988. First it will be established that the words "action or proceeding" in Section 1988 include agency administrative proceedings. Then it will be shown that the actions before the agency in this particular case were an agency administrative proceeding.

1. Agency Administrative Proceedings Are Included Within The Meaning Of The Phrase "Action or Proceeding" In Section 1988, As Established By The Statutory Language, This Court's Holding In Carey And The Legislative History.

i. The statutory language of Section 1988 establishes that agency administrative proceedings are included within the coverage of Section 1988's fee authorization. In enacting the Section 1988 attorney's fee provision Congress used broad language, including "any action or proceeding" which meets the other requirements of Section 1988. The usual meaning of the word proceeding includes agency administrative proceedings. Black's Law Diction-

ary states that the term proceeding includes "administrative proceedings before agencies, tribunals, bureaus or the like." Black's Law Dictionary 1083 (5th Ed. 1979). Indeed, petitioners concede that "the word 'proceeding' is broad enough to encompass a proceeding other than in court." (Pet.Br. 10).

ii. This Court's holding in *New York Gaslight Club, Inc. v. Carey,* 447 U.S. 54 (1980), establishes that the usual meaning of the word proceeding, which includes agency administrative proceedings, applies to Section 1988. This Court in *Carey* decided the issue of whether the word proceeding in the attorney's fees provision of Title VII included agency administrative proceedings. Section 1988 is patterned after the Title VII attorney's fee provision, Section 706(k), using the identical operative language, as can be seen in a comparison of the two statutes:

Title VII (Section 706(k))

> In any action or proceeding under this title the court, in its discretion, may allow the prevailing party other than the Commission or the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. Section 2000e-5(k)

Section 1988

> In any action or proceeding to enforce a provision of section 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. Section 1988

Finding in *Carey* that attorney's fees for agency administrative proceedings were recoverable, this Court stated:

> The words of § 706(k) leave little doubt that fee awards are authorized for legal work done in "proceedings" other than court actions. Congress' use of the broadly inclusive disjunctive phrase "action or proceeding" indicates an intent to subject the losing party to an award of attorney's fees and costs that include expenses incurred for administrative proceedings. . . . It cannot be assumed that the words "or proceeding" in § 706(k) are mere surplusage. 447 U.S. at 61.

This same broad phrase "any action or proceeding" in Section 1988 includes administrative proceedings, for not only did Congress use the same language in the two fee provisions, Congress specifically indicated for Section 1988, as this Court has noted, that "the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act." *Hensley v. Eckerhart,* 461 U.S. 424, 433 n.7 (1983) quoting S. Rep. No. 1011, 94th Cong. 2d Session 4 (1976).

Petitioners argue that the statutory language evidences a Congressional intent to exclude administrative proceedings from the coverage of Section 1988 because the statute directs "the court" to award the fees (Pet. Br. 10). This directive, however, is patterned after the attorney's fee provision of Title VII, which this Court found in *Carey* to simply designate the procedure for determining the fee award, rather than to evidence a Congressional intent to exclude administrative proceedings from the coverage of the attorney's fee provision. Section 706(k), the attorney's fee provision of Title VII, provides, as does Section 1988, that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . . " This Court, construing in *Carey* the language of Section 706(k), found that: "The words of 706(k) leave little doubt that fee awards are authorized for legal work done in 'proceedings' other than court ac-

tion." 447 U.S. at 61. The Court reached this conclusion notwithstanding the language in 706(k) that it is "the court" which awards the fee. 447 U.S. at 67. The administrative agencies in *Carey* and the instant case lacked the authority to make an award of attorney's fees. 447 U.S. at 47. The attorney's fees provisions of Title VII and Section 1988 provide that authority and specify the procedure for obtaining the award, namely by a petition to a court.

iii. The legislative history of Section 1988 confirms the statutory language which includes administrative proceedings. This Court in *Carey* noted the breadth of the language "any action or proceeding" used by Congress in the attorney's fee provision under Title VII, which is the identical language used in Section 1988. The Court described the language as a "broadly inclusive disjunctive phrase" and found it included administrative proceedings. 447 U.S. at 55. The breadth of this language was noticed also by the opponents of the Civil Rights Attorney's Fee Award Act of 1976 when the legislation was being debated in Congress. During the debate, Senator Helms, who helped lead the opposition to the bill, introduced a printed amendment on the Senate floor to amend the bill by deleting the words "or proceeding".[15] 122 Cong. Rec. 32933 (1976) (Remarks of Sen. Helms). The amendment was defeated by a wide margin in a recorded vote. *Id.*

In addition the legislative history of Section 1988 includes, in the House Report on the bill, citation with

15. Senator Helms and the other senators found the issue straightforward. Senator Helms introduced the amendment saying: "The amendment, as read, speaks for itself and I ask for the yeas and nays"; the vote was then taken without further discussion or debate. 122 Cong. Rec. 32933 (1976) (Remarks of Sen. Helms).

approval to a case in which attorney's fees were explicitly awarded for administrative representation, *Parker v. Matthew,* 411 F.Supp. 1059 (D.D.C. 1976). H.R. Rep. No. 1558, 94th Cong. 2d Sess. 7 (1976) (Hereafter "H.R. Rep."). This case explicitly discusses whether attorney's fees can be recovered for work in an administrative proceeding and finds that they can. The *Parker* court quoted Black's Law Dictionary regarding prevailing parties, emphasizing its application to administrative proceedings: "To be such [a prevailing party] does not depend upon the degree of success at different stages of the suit but whether, at the end of the suit *or other proceeding,* the party who has made a claim against the other has successfully maintained it." 411 F.Supp. at 1063. (emphasis supplied by the court) (quoting Black's Law Dictionary 1352 (4th ed. 1968)).

Also, it is significant that at the time Congress amended Section 1988 to include the attorney's fee provision, many courts had held that administrative remedies under Title VI had to be exhausted prior to the institution of a court action seeking redress under Title VI.[16] Given the broad language of the statute and the remedial goal of the statute, it is inconceivable that Congress intended

16. E.g. *Feliciano v. Ramsey,* 363 F.Supp. 656 (S.D.N.Y. 1973); *Dupree v. City of Chattanooga, Tenn.,* 362 F.Supp. 1136 (E.D. Tenn. 1973); and *Green v. Cauthen,* 379 F.Supp. 361 (D.S.C. 1974). Following the enactment of the Civil Rights Attorney's Fees Award Act of 1976 courts continued to require exhaustion. Ten months before the filing of the administrative complaint in this case, the district court below, *sua sponte,* raised the issue of administrative exhaustion in a Title IX case. *Crawford v. University of North Carolina,* 440 F.Supp. 1047 (M.D.N.C. 1977). The court pointed out that Title IX was patterned after Title VI and, without deciding the exhaustion issue, required the plaintiff under the doctrine of primary jurisdiction, to first file and process a complaint with the agency before the court would review the matter. *Id.* at 1058.

victims of discrimination to shoulder the expense of administrative proceedings when, at the time the Section 1988 attorney's fee provision was enacted, it appeared these proceedings might well be mandatory.

Notwithstanding the broad statutory language which includes administrative proceedings and the above specific references to proceedings in the legislative history, petitioners contend that the references in the legislative history to court actions and suits in court indicate an intent to exclude administrative proceedings from the coverage of Section 1988 (Pet.Br. 10-11). These references, however, merely reflect the fact that the most frequently used means of enforcing civil rights is in the courts. Thus, it is to be expected that the legislative discussion would use these terms. Moreover, this Court only last year, in a case construing the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. Sections 1961-1968, rejected the argument that references in the legislative history to one type of action are sufficient to negate broad statutory language that includes other types of actions. In the case of *Sedima, S.P.R.L. v. Imrex,* 105 S.Ct. 3275 (1985) the defendant argued that the legislative history of RICO referred only to actions against mobsters and organized criminals and thus it should not be construed to authorize actions against legitimate businesses, even though the statutory language included such actions. This Court rejected the argument, quoting with approval, *Haroco, Inc. v. American National Bank and Trust Co. of Chicago,* 747 F.2d 384, 398 (1984), *aff'd.* 105 S.Ct. 3291 (1985):

> The fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth. 105 S.Ct. at 3287. (citation omitted).

In the instant case, the language of Section 1988 is likewise broad and petitioners' attempt to narrow it should, as was the same attempt in *Sedima,* be rejected.

Amicus argues that a comment made by Representative Railsback in the House of Representatives' debate of the Civil Rights Attorney's Fee Award Act of 1976 indicates that Congress intended that the bill exclude Title VI administrative proceedings (Amicus Br. 18). Such isolated comments have generally not been considered to be reliable indicators of Congressional intent. This Court has previously held that isolated statements by members of Congress are "not impressive legislative history." *Garcia v. U.S.,* 105 S.Ct. 479, 484 (1984), *quoting Zuber v. Allen,* 396 U.S. 168, 187 (1969). Giving such statements great credence would, as this Court stated, create a "type of reverse parole evidence rule, where oral statements were elevated above enacted language in determining the meaning of the statute." *Garcia,* at 484.

More importantly, the comment cited by amicus was directed to a separate issue and did not go to the issue of whether Section 1988 was intended to apply to administrative proceedings. In the comment quoted by amicus, Representative Railsback was responding to questions regarding whether including Title VI and Title IX in Section 1988 would determine the unsettled issue of whether there was an implied independent private cause of action under those titles. His answer that "This bill merely creates a remedy in the event the courts determine that an individual may sue under these statutes" can only be read as addressing the question of whether Congress, by passing Section 1988, intended to put its imprimatur on such implied independent actions. 122 Cong. Rec. 35124 (1976) (remarks of Rep. Railsback). Amicus suggests

that this comment means that Congress intended for Section 1988 to be applicable only to such judicially created implied rights under Title VI (Am. Br. 18). That amicus misinterprets this comment is also shown by the fact that amicus' interpretation would deny attorney's fees for other representation for which Section 1988 unquestionably authorizes fees. Title VI explicitly provides in Section 603, and did so at the time these comments were made, a private cause of action by "any person aggrieved" for court review of agency decisions on Title VI administrative complaints. It is beyond peradventure that Section 1988 authorizes fees in such Section 603 court reviews. Under amicus' erroneous reading of this isolated comment, no fees would be allowed for this statutorily authorized judicial review, since such an action would not be a judicially created action.

When the full legislative history of Section 1988 is reviewed, it confirms the statutory language which includes administrative proceedings in the attorney's fee authorization. This is manifested not only by the specific legislative history regarding the word proceeding, but also by the overall goal of Congress expressed in the legislative history. The House Report states: "The effective enforcement of Federal civil rights depends largely on the efforts of private citizens." H.R. Rep. 1. Similarly, the Senate Report states: "The Committee has found that fee awards are essential if the Federal statutes to which [Section 1988] applies are to be fully enforced. We find that the effects of such fee awards are ancillary and incident to securing compliance with these laws, and that fee awards are an integral part of the remedies necessary to obtain such compliance." (footnote omitted) S. Rep. 1011, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S.

Code Cong. & Ad. News, 5908, 5913 (hereafter "S.Rep"). Further, in the legislative history of Section 1988, Congress restated the principle that: "In the civil rights area, Congress has instructed the courts to use the broadest and most effective remedies available to achieve the goals of our civil rights laws." (footnote omitted) S. Rep. at 3. To give effect to the phrase "any action or proceeding" and to carry out the Congressional goal of encouraging the enforcement of the civil rights laws, Section 1988 must be applied to authorize fee awards for representation in administrative proceedings.[17]

iv. Petitioners, in addition to arguing that the phrase "any action or proceeding" does not include administrative proceedings, argue that even if it does, it does not include optional administrative proceedings, such as the one in this case (Pet. Br. 21). This argument is erroneous because it is irreconcilable with the statutory language of Section 1988. Further, this Court's decisions have

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17. Petitioner also argues that this Court decided in *Webb v. Dyer County Board of Education*, 105 S.Ct. 1923 (1983) that Section 1988 only authorized fees for court actions. As petitioner points out, this Court in *Webb* stated: "The time that is compensable under Section 1988 is that 'reasonably expended *on the litigation*'." 105 S.Ct. at 1928, *quoting Hensley v. Eckerhart*, 461 U.S. 424 (1983) (original emphasis). However, this statement was not addressed to the question of whether administrative proceedings are included within the phrase "action or proceeding" in Section 1988. It was addressed to the argument by the petitioner in *Webb* that fees for a state tenure administrative proceeding, which is not covered by Section 1988, should automatically be recoverable because a related Section 1983 court action was subsequently filed and the time spent in the non-fee administrative proceeding was helpful in the fee-covered court action. It does not indicate a general disapproval of recovering fees under Section 1988 for administrative representation. Indeed, in *Webb* the defendant argued specifically that Section 1988 did not apply to administrative proceedings. This Court refused to adopt that argument, which would have disposed of the case. *Id.* at 1932. (Brennan and Blackmun, J.J. concurring in part, dissenting in part).

shown that the mandatory or optional nature of a proceeding does not determine whether it is a proceeding within the meaning of Section 1988.

The statutory language of Section 1988 cannot be reconciled with petitioners' argument that the coverage of the statute is limited to administrative proceedings which are mandatory. First the statute provides for fees in "*any* action or proceeding" (emphasis added). Petitioners' construction of the statute contradicts the word "any." Second, petitioners' argument is tantamount to nullifying the words "or proceeding", since none of the civil rights laws covered by Section 1988 have mandatory administrative proceedings. As this Court stated in *Carey*: "It cannot be assumed that the words 'or proceeding' in Section 706(k) are mere surplusage." 447 U.S. at 61. Significantly, in this case although petitioners argue that Section 1988 does not apply to administrative proceedings, they never suggest anything to which the words "or proceeding" do refer. In effect their unstated argument is that the words are "mere surplusage." The general presumption against construing statutory language as surplusage is applicable to Section 1988, particularly given the previously described unsuccessful attempt of an opponent of the bill, Senator Helms, to delete the phrase "or proceeding" from the bill. To give effect to the words "or proceeding" in Section 1988 these words must be applied to the non-mandatory administrative proceedings in the civil rights laws covered by Section 1988.

Furthermore, this Court's decisions in *Webb v. Board of Education of Dyer County*, 105 S. Ct. 1923 (1985) and *Smith v. Robinson*, 104 S. Ct. 3457 (1984) show that the mandatory or optional nature of a proceeding does not determine whether it is a proceeding within the meaning of

Section 1988.[18] In *Webb*, the plaintiff sought to recover fees for representation in a county school board administrative proceeding, which preceded a Section 1983 federal court action. Plaintiff had argued that the school board hearings "were 'proceeding[s] to enforce a provision of Section 1983 within the meaning of Section 1988"[19] 105 S.Ct. 1927. This Court rejected the claim stating:

> "[T]he school board proceedings in this case simply do not have the same integral function under § 1983 that state administrative proceedings have under Title VII. Congress only authorized the district courts to allow the prevailing party a reasonable attorney's fee in an action or proceeding to enforce [§ 1983]. Administrative proceedings established to enforce tenure rights created by state law simply are not part of the proceedings to enforce § 1983 . . . ." 105 S.Ct. at 1928.

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18. Actually, the administrative proceeding in Carey was only partially mandatory. The title VII complainant is only required to give the state agency the *opportunity* to process the complaint. Two hundred and forty days after the filing of the charge the complainant has an unfettered right to bring a court action, even if the agency is still processing the complaint. In the Carey case fees were authorized for representation in both the mandatory and optional portions of the proceeding. *See, Webb*, 105 S.Ct. at 1928 n.15. (Brennan and Blackmun, J.J., concurring in part and dissenting in part.) The optional/mandatory distinction between Carey and this case is further blurred by the fact, that at the time Section 1988's attorney's fee provision was enacted and at the time this administrative complaint was filed, it appeared that Title VI administrative proceedings might well be mandatory. See *supra* at 19 n.16.

19. The *Webb* petitioner presented two theories of recovery. First, he argued that the county school board hearing was an "action or proceeding to enforce a provision of . . . § 1983." He also argued that if the county school board was not an action or proceeding to enforce Section 1983, the time spent in the hearing should still be recoverable because it was helpful in the subsequent Section 1983 court action. 105 S.Ct. 1927.

The petitioner in *Webb* did not have to exhaust the state tenure proceeding before filing a Section 1983 court action, thus the proceeding was optional. But as Justices Brennan and Blackmun pointed out in their concurring opinion:

> The issue of exhaustion does not bear on the definition of the phrase "action or proceeding", however, but cuts instead to Section 1988's second threshold requirement: fees may be awarded only if the action was pursued to "enforce a provision" of the civil rights law. 105 S.Ct. at 1931. (Brennan and Blackmun, J.J., concurring in part and dissenting in part.)[20]

This point can also be seen in the case of *Smith v. Robinson,* which was cited by the Court in *Webb* when it rejected the argument that the school board proceeding was one to enforce Section 1983. In *Smith* the plaintiff sought fees under Section 1988 for state administrative remedies under the Education of the Handicapped Act (EHA), 20 U.S.C. Section 1400 *et seq.* These proceedings *were* mandatory and had to be exhausted prior to bringing a Section 1983 federal court action. This Court rejected the fee claim, however, because although the proceedings were mandatory, they were mandated by the EHA, a non-fee statute and were not mandated by Section 1983. Thus they were not proceedings to enforce one of the provisions listed in Section 1988, namely, Section 1983.

Hence, *Webb* and *Smith* show that the mandatory or optional nature of a proceeding is irrelevant to the issue

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20. Justices Brennan and Blackmun concurred in the Court's finding that the county school board hearing was not a proceeding to enforce a provision of Section 1983. They dissented from the Court's determination that the claim should not be remanded for an award of fees for the hours in the non-fee proceeding that were necessary and useful to the Section 1983 court action.

of whether the proceeding meets the requirement of Section 1988 that it be an "action or proceeding."

2. The Actions Before The Agency In This Case Constituted An Agency Administrative Proceeding.

As shown in the previous section, agency administrative proceedings are included within the meaning of the word "proceeding" in Section 1988. Respondents' claim for fees thus meets Section 1988's requirement that the claim be for representation in a proceeding, because the actions before the agency in this case constituted an agency administrative proceeding. This is established by the substantial actions before the agency in this case, actions which come within the usual meaning of the word proceeding.

The actions before the agency in this case were extensive. Respondents filed a formal, detailed complaint with the agency (J.A. 73-89). The agency formally investigated the complaint, including conducting a field investigation in North Carolina (J.A. 58). Extensive materials were submitted to the agency by petitioners and respondents (FIAR 158-60). The agency issued a finding of probable cause of a Title VI violation (J.A. 97). More than two dozen negotiation sessions followed (J.A. 35-52). And the proceeding was concluded by the execution of a formal settlement document, which set out in extensive detail the remedial efforts to be taken by petitioners. These events spanned a period of more than four years.

These actions come within the normal meaning of the word proceeding, which is not limited to agency hearings. This is seen in cases applying the word "proceeding" in 18 U.S.C. Section 1505, which prohibits obstructing justice

in a "pending proceeding" before any United States department or agency.[21] In the case of *Rice v. United States,* 356 F.2d 709 (8th Cir. 1966), the court that found the word proceeding included an investigation by the National Labor Relations Board following a complaint by a worker. The defendant argued that the statute did not apply because there was no proceeding. The Court rejected this argument finding that:

> "Proceeding" is a comprehensive term meaning the action of proceeding—a particular step or series of steps, adopted for accomplishing something. This is the dictionary definition as well as the meaning of the term in common parlance. [fn] Proceeding before a governmental department or agency simply means proceeding in the manner and form prescribed for conducting business before the department or agency, including all steps and stages in such an action from its inception to its conclusion. [fn See Webster's Third New International Dictionary] 356 F.2d at 712.

Similarly, the court in *United States v. Browning,* 572 F.2d 720 (10th Cir. 1978), *cert. denied,* 439 U.S. 822 (1978), applied 18 U.S.C. Section 1505 to an inquiry by the Bureau

21. 18 U.S.C. Section 1505 in pertinent part, read as follows at the time the cases cited *infra* were decided:

> Whoever corruptly, or by threats or force or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—shall be fined not more than $5,000 or imprisoned not more than five years, or both.

In 1982, Pub. L. 97-291, amended, *inter alia,* the above language substituting "any pending" for "such" after "law under which", and substituting "any" for "such" before "department" and before "inqury".

of Customs. In *Browning,* the Customs Bureau was investigating the accuracy of price representation on an entry form filed by the defendant. Like the defendant in *Rice,* Browning argued that no "proceeding" was pending at the time of the allegedly illegal actions. The court rejected this argument, finding:

> In sum, the term "proceeding" is not, as one might be inclined to believe, limited to something in the nature of a trial. The growth and expansion of agency activities have resulted in a meaning being given to "proceeding" which is much more inclusive and which no longer limits itself to formal activities in a court of law. Rather, the investigation or search for the true facts such as that described in the indictment here is not to be ruled as a non-proceeding simply because it is preliminary to indictment and trial. 572 F.2d at 724.[22]

Thus, these decisions[23] under 18 U.S.C. Section 1505 show that the meaning of the word proceeding is broad and easily encompasses the actions before the agency in this case.

Petitioners cite the Title VI requirement that agencies seek to conciliate a Title VI violation before imple-

22. All other federal Courts of Appeals' decisions are in accord with the *Rice* and *Browning* decisions: *U.S. v. Fruchtman,* 421 F.2d 1019 (6th Cir. 1970); *U.S. v. Vixie,* 532 F.2d 1277 (9th Cir. 1976); *U.S. v. Abrams,* 427 F.2d 86 (3rd Cir. 1970), *cert. denied,* 400 U.S. 832 (1970); *U.S. v. Sutton,* 732 F.2d 1483 (10th Cir. 1984), *cert. denied,* 105 S.Ct. 903 (1985).

23. These broad interpretations of the word "proceeding" were made notwithstanding the doctrine that criminal statutes should be strictly construed. *Rice,* 356 F.2d at 714; *Dunn v. United States,* 442 U.S. 100, 99 S.Ct. 2190, 60 L.Ed.2d 743 at 112 (1979). In contrast, Section 1988 is a remedial statute enacted to further the enforcement of civil rights and Congress has instructed the courts to apply it broadly.

menting enforcement orders[24] and argue that because this case was settled in the conciliation stage prior to an adjudicatory hearing there was no proceeding (Pet.Br. 12). This Court's analysis in *Carey* shows that petitioner's restrictive interpretation of the word proceeding is incorrect. In addition, Congress' instruction in the legislative history of Section 1988 to award attorney's fees when cases are resolved in prehearing settlements would be frustrated by such a restrictive interpretation of the word proceeding.

In *Carey,* this Court analyzed a proceeding under Title VII, which, like title VI, mandates conciliation efforts.[25] The Court concluded that the proceeding began

24. " . . . Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which noncompliance has been so found, or (2) by any other means authorized by law. *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No action shall become effective until thirty days have elapsed after the filing of such report." 42 U.S.C. 2000d-1.

25. Title VII provides: "If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. Section 2000e-5(b).

with procedures prior to the hearing stage, including conciliation efforts:

> *The first stage of the state administrative action is the investigation;* this results in either a finding of probable cause or a dismissal of the complaint. A finding of probable cause after investigation is a necessary prelude to the public hearing . . .
>
> Following the investigation, the Division attempts to conciliate the complainant's grievance with the employer . . . .
>
> If efforts at conciliation fail . . . a hearing is scheduled.

447 U.S. at 68-69 (citations omitted; emphasis supplied).

Petitioners' restrictive intrepretation of the word proceeding would frustrate Congress' instruction to encourage settlements by awarding attorney's fees in such cases, including cases settled prior to a hearing. Congress, in the committee reports stated:

> [F]or purposes of this award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief. S.Rep. at 5 (citations omitted).
>
> [A] prevailing party should not be penalized for seeking out-of-court settlement, thus helping to lessen docket congestion. Similarly, after a complaint is filed, a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as injunction is needed. H.R. Rep. at 7.

This Court also has on numerous occasions strongly endorsed the policy of encouraging settlements.[26] The em-

26. "Most important, [this interpretation of Title VII] serves as a potent force on behalf of Title VII's objective of

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phasis Congress placed on conciliation in Title VI and Title VII makes this policy of awarding fees in settlements particularly appropriate to administrative proceedings under these titles. In *Carey*, this Court concluded:

> It would be anomalous to award fees to the complainant who is unsuccessful or only partially successful in obtaining state or local remedies, but to deny an award to the complainant who is successful in fulfilling Congress' plan that federal policies be vindicated at the state or local level. 447 U.S. at 66.[27]

It would be equally anomalous to award fees to the complainant who is unsuccessful in obtaining relief through conciliation, but to deny an award to the complainant who is successful in fulfilling Congress' plan that civil rights violations be remedied through conciliation.[28]

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bringing discrimination to an end more quickly than is often possible through litigation." *EEOC v. Ford*, 458 U.S. 219 (1982) at 241; "In short, settlements rather than litigation will serve the interests of plaintiffs as well as defendants." *Evans v. Jeff D.*, 54 U.S.L.W. 4359 (U.S. April 21, 1986) at 4363 *quoting Marek v. Chesney*, 105 S.Ct. 3012 (1985), at 3018.

27. Petitioners' construction of the word proceeding would preclude complainants in EEOC proceedings against private employers from obtaining fee awards, for the proceeding ends after the conciliation stage without there ever being an adversary hearing. 29 C.F.R. part 1601. Similarly, the Maine Human Rights Commission, a certified designated EEOC Title VII state referral agency, does not provide for any administrative hearing. If conciliation fails, the proceeding ends and court action must be initiated. (Rule 2.09B, Maine Human Rights Commission Rules of Procedure.) Under petitioner's construction of "proceeding" Title VII complainants referred by the EEOC to the Maine agency would never be entitled to attorney's fees for administrative representation because there is never a hearing.

28. Amicus argues that recovery for administrative representation under the Equal Access to Justice Act, 5 U.S.C. 504, 28 U.S.C. 2412(d)(3) is limited to adversary proceedings and that allowing recovery for fees for prehearing administrative representation would be unprecedented (Am.Br. 22). First, the

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B. The Federal Administrative Proceeding In this Case Was One "To Enforce . . . Title VI."

Section 1988 requires that the proceeding in which respondents prevail be one "to enforce a provision of . . . title VI of the Civil Rights Act of 1964 . . . ." It is clear that respondents meet this requirement. The administrative proceeding in the instant case was specifically established to enforce Title VI. Title VI directed each federal department and agency to adopt regulations to enforce its provisions. 42 U.S.C. Section 2000d-1. The United States Department of Transportation set out its regulations at 49 C.F.R. Part 21, which is entitled "NONDISCRIMINATION IN FEDERALLY-ASSISTED PROGRAMS—EFFECTUATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964." Section 21.1 of Part 21 explains the purpose of that part:

> The purpose of this part is to effectuate the provisions of title VI of the Civil Rights Act of 1964 (hereinafter referred to as the Act) to the end that no person in the United States shall, on the grounds of race, color, or national origin, be excluded from

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Equal Access to Jusice Act uses specific narrow language which limits its application to adjudicatory hearings. "An agency that conducts an adversary adjudication shall award . . . ." 5 U.S.C. 504(a)(1). The use of this narrow language in the Equal Access to Justice Act as opposed to the broad language of Section 1988 —"any action or proceeding"—supports, rather than contradicts, the conclusion that Section 1988's scope is broader than that of the Equal Access to Justice Act. Second, awarding attorney's fees for prehearing representation is hardly unprecedented. This Court authorized recovery of fees including such representation in *Carey*. *See, supra* at 30-31. Also the regulations for Title VII administrative proceedings for federal employees specifically provide for an award of attorney's fees for settlements at any point in the proceedings, either before or after a hearing. 29 C.F.R. Sections 1613.217(a) and (c).

participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from the Department of Transportation.

Furthermore, the primary claim raised by respondents was petitioners' Title VI violation (J.A. 73-89).

C. Respondents Were A "Prevailing Party" In The Title VI Federal Administrative Proceeding.

The events in the Title VI federal administrative proceeding in this case show that respondents meet the Section 1988 requirement of being a "prevailing party". Respondents triggered the administrative proceeding with their complaint, which set out in detail the facts and law establishing the petitioners' Title VI violation (J.A. 62-96). The issues in the investigation were those raised by respondents' complaint.[29] After the agency made its probable cause determination, it urged the respondents to negotiate with the petitioners (J.A. 108). The respondents carried out these negotiations, advising the agency of their progress.[30] Finally, it was respondents who signed with petitioners the settlement document, which resolved the complaint and concluded the administrative proceeding. The agency itself was not a party to the settlement agreement (*Id*). Under the settlement agreement respondents obtained very substantial relief, the *quid pro quo* for which was the respondents giving up their legal right to pursue their Title VI claims (J.A. 108-130). In the instant case, respondents were accorded party status by both the agency

29. *See*, agency investigation plan (FIAR, 51-52).

30. *See*, letters from respondents' attorney to USDOT Office of Civil Rights (*Id*. 206-7, 212, 213-15).

and the petitioners.[31] Indeed, petitioners have never contested the fact that respondents were parties in the administrative proceeding. This is no oversight, rather it reflects the primary role which respondents performed in the proceeding.

Notwithstanding the above events, amicus, who did not participate in the administrative proceeding, argues that respondents do not meet the Section 1988 requirement of being a party. Significantly, the Court of Appeals below specifically concluded that respondents were prevailing parties (Pet. App. 8) and petitioners have not before this Court challenged that conclusion. Ordinarily this Court will not consider questions unless they are contested in both the courts below and presented in the petition for certiorari.[32] In this case respondents' status as parties in the administrative proceeding was not challenged in the courts below, in the petition for certiorari, or even in petitioners' brief on the merits. If this Court chooses to consider amicus' argument, it is clear that in this case respondents were not only a party, they were, with the agency's encouragement, the primary prosecuting party in the administrative proceeding.

Amicus bases its argument on the fact that complainants under Title VI have limited rights, that some Title VI regulations state that complainants are not parties to

31. Amicus cites *Arriola v. Harville*, 781 F.2d 506 (1986), which denied a fee claim under the Voting Rights Act, finding that the plaintiffs in that case were not parties to a preclearance review. Regardless of the correctness of that decision, it is inapplicable to this case for here the agency and petitioners did accord party status to respondents.

32. In addition, amici are not permitted to present questions not raised by petitioners. *United Parcel Service v. Mitchell*, 451 U.S. 56, 60 n.2 (1981). In rare exceptional circumstances, this Court has reviewed plain errors evident from the record. This case does not meet the strict standards required for such review. *Conner v. Finch*, 431 U.S. 407, 421 n.19 (1977).

the administrative hearings, and primarily on its characterization of Title VI administrative proceedings as being the agency pursuing the broad public interest rather than the rights of particular complainants (Am. Br. 14). Amicus asserts that these characteristics distinguish Title VI administrative proceedings from Title VII administrative proceedings. However, as the following comparison of Title VI and Title VII agency procedures shows the same characteristics amicus cites regarding Title VI proceedings apply to Title VII, in which complainants are, as this Court found in *Carey,* parties for purposes of recovering attorney's fees. Moreover, this comparison shows that the supposed fundamental difference which amicus sees in the nature of Title VI and Title VII administrative proceedings is illusory, for both are dual function proceedings with the agency pursuing the broad public interest as well as the particular interest of the complainant.

For example, amicus characterizes Title VI administrative proceedings as different from those under Title VII because individual complaints are just one means of agency enforcement and the agency retains control of the ensuing proceedings (Am. Br. 17). These statements are true regarding Title VI, but they are likewise true regarding Title VII. Under both the state Title VII regulations before this Court in *Carey* and the federal Title VII regulations, proceedings can be begun by the agency on the agency's own initiative and without an individual complaint (9 NYCRR 465.3(a) (3); 29 C.F.R. 1601.12). This is also typical of the other state Title VII agency procedures.[33] Moreover, even if the proceeding is begun by an

33. *See,* e.g., California-the agency may initiate proceeding on its own. Rule 7421(d), California Fair Employment and

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individual's complaint, the New York regulations before this Court in *Carey,* like those in a number of states, permit the agency to bring a complaint in its own name on the same facts even if the individual complaint is withdrawn (9 NYCRR 465.5(a)).[34] Also, New York regulations, like those of many states, give the agency the right to define the scope of the proceeding by *sua sponte* amending the complainant's complaint (9 NYCRR 465.4(b) and (c)).[35] After the proceeding is initiated, the agency under both Title VI and Title VII conducts an informal probable cause investigation, which is in the total control of the agency. If probable cause is found, both the Title VI and Title VII agencies attempt conciliation. The Title VII complainants' rights regarding conciliа-

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Housing Commission Rules of Procedure; *accord,* District of Columbia (D.C. Human Rights Act Sec. 1-2544(a); and Maryland (Maryland Fair Employment Practices Act Sec. 9(b)). *See* other comparable state procedures listed in *BNA Labor Relations Reporter, Vol. 8A Fair Employment Practices Manual.* All references to Title VII state administrative procedures in this brief are to procedures of agencies which have been certified and designated by the EEOC for referral of Title VII charges. 29 C.F.R. 1601.80.

34. *See,* e.g. California: "After submission of a case for decision, an accusation may be withdrawn, or settlement ordered, only with the approval of the Commission." Rule 7461, California (Fair Employment and Housing Commission Rules of Procedure); Iowa: "However, nothing herein shall preclude the commission from continuing the investigation and initiating a complaint on its own behalf against the original respondent, as provided for in the Act, whenever it deems it in the public interest." (Rule 1.3(2), Iowa Civil Rights Commission Rules of Procedure).

35. *See,* e.g. California: "At any time before the matter is submitted for decision, the Department may file and serve an amended or supplemental accusation on all parties and complainants." (Rule 7445(a), California Fair Employment Commission on Human Rights Rules of Procedure).

tion efforts are limited. For example the New York regulations before this Court in *Carey* specifically provide that the agency may enter into a conciliation agreement over the objection of a complainant and then terminate the entire proceeding (9 NYCRR 465.7(e)).[36] The New York regulations even give the agency the broad power to dismiss, prior to hearing and without review, any case for "administrative convenience", which includes the agency's determination that "processing the complaint will not advance the State's human rights goals." (9 NYCRR 465.5 (d)(2)(v)). Agency control is also apparent in the hearing procedures in the state Title VII regulations. Typically the agency, not the complainant, presents the case on behalf of the complaint and this is done through an agency attorney. In a number of states the complainant may not participate in the hearing unless the complainant moves and is allowed to intervene, and intervention is in the discretion of the agency.[37] And in Mary-

36. *See, e.g.* Connecticut: The commissioner enters into the conciliation agreement. "The complainant may apply to the chairman for reconsideration of the terms of such conciliation . . . . An application for reconsideration of the terms of the conciliation may be granted or denied at the discretion of the chairman" (Rule 31-125-16, Connecticut Commission on Human Rights and Opportunity Rules of Procedure); Minnesota: "The Commissioner and a respondent may at any time enter into an agreement or stipulation to conciliate, settle, or compromise the subject matter of a charge or a complaint." (Rule 5000.0800(3), Minnesota Department of Human Rights Rules of Procedure); and Maine: Commission may execute conciliation agreement even if complainant fails or refuses to agree to the terms. (Rule 2.08 (C), Maine Human Rights Commission Rules of Procedure).

37. California: " 'Party' includes the Department and any employees or agents of the Department acting in an official capacity, the respondent, and any person allowed to intervene in the proceeding." (Rule 7410(i), California Fair Employment and Housing Commission Rules of Procedure); Colorado: "At

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land, the regulations specifically provide that the complainant is not a party to the hearing, although the complainant is allowed to paticipate in the hearing.[38] Other state procedures follow the pattern of the Title VI regulations in this case, setting out the rights of the agency and the respondent without specifying the rights of the complainant.[39] Finally, after any evidentiary hearing many state Title VII agencies lack enforcement power, as does EEOC, and it is completely within the discretion of the agency whether to seek relief in court on behalf of the complainant. In contrast, under the Title VI regulations in the instant case, while the agency had discretion in the means of obtaining compliance, the regulations required the agency to obtain compliance and Section 603 of Title

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the discretion of the hearing officer, complainant shall be permitted to intervene either in person or by counsel to present oral testimony or other evidence and to examine and cross-examine witnesses." (Rule 10.8(A)(2), Colorado Rights Commission Rules of Procedure); Massachusetts: "In the discretion of the commission, the complainant may be allowed to intervene and present testimony in person or by counsel." (Mass. Ann. Laws ch. 151B, § 5 (Michie/Law Co-op 1986)). Missouri: "At the discretion of the hearing panel or hearing examiner, the complainant may be allowed in person or by counsel, to intervene and present testimony and cross-examine witnesses." (Rule 4 CSR 180-2.030, Missouri Commission on Human Rights Rules of Procedure); and New Hampshire:: "In the discretion of the commission, the complainant may be allowed to intervene and present testimony in person or by counsel." (N.H. Rev. Stat. Ann. ch. 354-A:9 (1984)).

38. "As used in Regulation .07 [procedures regarding the evidentiary hearing on the complaint] the word 'party' means the Maryland Commission on Human Relations or the respondent." (Rule .01(G), Maryland Commission on Human Relations Rules and Procedures). These rules do allow the complainant to participate in the hearing and specifically make the complainant a party to procedures reviewing, on the record, the decision of the hearing officer (*Id.*).

39. *E.g.* Connecticut Commission on Human Rights and Opportunities Rules of Procedure.

IV provides the complainant with a right to review of the agency action.[40]

Thus, from the above it can be seen that while Title VI agency enforcement is concerned with the broader public interest and this is reflected in the agency procedures, so too is Title VII agency enforcement. And while a Title VI complainant's administrative procedural rights may be limited, so too are those of most Title VII complainants. And both perform an important role in the administrative process and are "parties" under their respective attorney's fees provisions.[41]

D. Awarding Attorney's Fees In This Case Furthers The Congressional Goal Of Section 1988 Of Assisting The Enforcement Of Civil Rights And It Encourages The Settlement Of Civil Rights Disputes.

Congress in enacting Section 1988 sought to further enforcement of our civil rights. There are manifest good

40. Amicus points out that Congress anticipated that complainants would have a role in the Title VII agency enforcement efforts. It is clear that Congress likewise anticipated that individuals would file complaints with the agencies under Title VI. Several members of Congress unsuccessfully objected to such involvement by individuals. Regarding the Title VI judicial review provision of Section 603 they stated: "It should also be remembered that this judicial procedure is available to those who bring charges of discrimination and who are aggrieved by the negative ruling of the administrative agency." (Comments of Hon. Richard H. Poff and Hon. William Cramer, *reprinted in*, 1964 U.S. Code Cong. & Ad. News 2470).

41. Amicus' contention that complainants cannot be parties in administrative proceedings for purposes of Section 1988 fee awards would produce a result that fails to carry out the goal of Congress in enacting Section 1988. If complainants are ineligible for fees, then only respondents would be eligible for fees (assuming they met the standard for prevailing defendants), since Section 1988 excepts the United States from recovering fee awards. While Congress was not hostile to defendants' recovering fees in limited situations, providing fees for defendants was certainly not the main goal of Section 1988. *See*, S. Rep. 5.

reasons for Congress to have concluded that informed and active participation by administrative complainants, which requires participation by counsel, improves Title VI enforcement. Complainants come to these proceedings in the best position to know the factual bases for their complaints and with by far the greatest incentive to pursue Title VI grievances vigorously. Agencies themselves have conceded that they do not have sufficient resources to process Title VI complaints without such assistance: "HEW has candidly admitted its inexperience and inadequate staffing in this area (Title VI administrative reviews of hospital relocations)." *NAACP v. Wilmington Medical Center*, 599 F.2d 1247, 1249 (3rd Cir. 1979); *see also Cannon v. University of Chicago*, 441 U.S. 677 (1979): "HEW has candidly admitted that it does not have the resources necessary to enforce Title IX in a number of circumstances." 441 U.S. at 708 n.42.

Perhaps most important, attorneys for complainant enhance the prospect that the case will be resolved by conciliation.[42] By its nature conciliation requires participation by the private party aggrieved, for often the process will require substantial settlement negotiations with complainants, as occurred between respondents and petitioners in this case. In addition, complainants are more likely to join in a conciliation agreement if their own counsel has participated in the events leading up to the

42. Conciliation, as well as other mechanisms for negotiation and less formal dispute resolution, are valuable tools in an agency's kit of procedures, because such mechanisms reduce costs compared to more formal procedures, lower court filings to the extent that they are successful, and may reach stable and satisfactory resolution more often than formal adjudication. These and related virtues have been widely noted. See Burger, "Isn't There A Better Way?" 68 *ABA J.* 274; *see also*, cases cited *supra* at 31-32 n.26.

settlement and in the drafting of the settlement document. In this case complainants agreed to the relocation of their entire community. Such agreement would have been unlikely if complainants had not been secure that their rights were fully protected by their own counsel. Finally, the chances for settlement are further increased because the prospect of having to pay conmplainant's attorney's fees enhances the probability that defending parties will earnestly explore settlement at early stages.[43] See, *Evans v. Jeff D., supra.*

On the other hand, if this Court rules that persons like respondents and proceedings like the conciliation efforts here do not come within the ambit of Section 1988, such persons will have a strong incentive to avoid participation in such efforts and to seek avenues of redress that do hold out the prospect of attorney's fees, for otherwise they may have to forego representation entirely. Accordingly, agencies will be less able to employ expeditious procedures such as conciliation, mediation and negotiation because parties essential to those efforts, the persons aggrieved will be forced to pursue their claims in federal courts, where they can recover a complete remedy, which includes attorney's fees.

Amicus argues that awarding fees for administrative representation will disrupt agency proceedings, since it will encourage complainants' participation, and the agency and the complainant may have divergent interests. This

43. Respondents note that in Carey and in this case, in which the defending parties did not believe they were liable for complainants attorney's fees in the administrative proceeding, the proceedings took more than three and four years, respectively, to be resolved. Respondents suggest no bad faith in these proceedings, but adding liability for attorney's fees into the defending parties' calculus of settlement decision making would likely bring many of the proceedings to an earlier resolution.

argument is both wrong and, since Congress has made a contrary judgment, beside the point. As shown by the procedural limitations on complainants' rights in Title VII regulations, including those before this court in *Carey,* agencies can easily control the course of the proceedings, notwithstanding the presence of complainant's counsel and the ability of complainants to recover attorney's fees. Regarding the possible divergent interests of the agency and the complainant, this fact supports rather than negates,[44] the need for complainants' own counsel, as this court found in *Carey:*

> It is thus obvious that the assistance provided a complainant by the Division attorney is not fully adequate, and that the attorney has no obligation to the complainant as client. In fact, at times the position of the Division may be detrimental to the interests of the complainant and to enforcement of federal rights. Representation by a private attorney thus assures development of a complete factual record at the investigative stage and at the administrative hearing. At both, settlement is possible and is encouraged. A Division employee cannot act as the complainant's attorney for purposes of advising him whether to accept a settlement. Retention of private counsel will help assure that federal rights are not compromised in the conciliation process. 447 U.S. at 70.[45]

44. In fact amicus made this argument to this Court in *Carey:* "Sections 706(f)(i) of Title VII and 297(4)(a) of the New York Human Rights Act, N. Y. Exec. Law (McKinney 1972-1978 Supp.), both reflect legislative understanding that public agencies vindicating vital public interests may not adequately represent the individual, because the interest of the government and the narrower interest of the individual often diverge."
Brief for the United States and the Equal Employment Opportunity Commission As Amicus Curiae, at 20.

45. The need for attorneys for complainants is particularly great given the primary function that amicus assigns to Title VI

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If attorneys are to be available to complainants, it is essential that attorney's fees be recoverable for administrative representation. As Congress recognized in enacting Section 1988, many of the victims of racial discrimination are poor and unable to retain attorneys: "In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer." S. Rep. 3.[46] Also, as was the situation in this case, frequently the relief obtained will not include recovery of money from which a fee could be paid. In enacting Section 1988 Congress explicitly considered this factor, which is embodied in the concept of the private attorney general: "When a plaintiff brings an action under [Title II] he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general', vindicating a policy that Congress considered of the highest priority." *Id.* quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), at 402.

Still, Amicus asserts that fees awards will produce incentives for complainants to delay or disrupt the agency enforcement effort or will result in a reduction of the

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administrative proceedings. They assert that administrative proceedings are "central" to Title VI enforcement and "if requested by the federal government, a court should normally stay a private Title VI enforcement action pending completion of federal administrative effort . . ." (Am. Br. 28). Amicus' position that victims of discrimination should be denied the means to secure attorneys and effectively participate in these proceedings is particularly incongruous with these proceedings serving as the primary forum for Title VI enforcement.

46. For example, more than one third of blacks in the country live in poverty. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1986 series P-60 nos. 147 and 149*, at 457 (1986).

amount of substantive relief offered to take into account the attorney's fees liability (Am. Br. 27). The short answer, again, is that Congress has made a contrary judgment. Amicus' claims apply to any and all situations in which attorney's fees are recoverable. Congress' enactment of Section 1988 demonstrates that in its judgment the benefits of providing access to attorneys for victims of civil rights discrimination far outweighs these possibilities. "Fee awards are an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these [civil rights] laws contain . . . ." S. Rep. 3. Moreover, there are adequate safeguards to prevent any of the problems amicus raises. Meeting the requirements of Section 1988 is only the threshold step in recovering attorney's fees. The district court must still, as it did in this case, approve the amount of the fees. The court's wide discretion in determining the amount of the fees and the opposing parties' interest in limiting the fee award provide ample protection to prevent any of the possible problems suggested by amicus.

In summary, affirming the judgment of the Court of Appeals granting attorney's fees in this case will assist the enforcement of civil rights by making it possible for the person aggrieved by the civil rights violation to participate in the administrative enforcement proceeding through counsel. Affirming this judgment also increases the chances that these civil rights disputes will be resolved through settlements.

II. ATTORNEY'S FEES FOR ADMINISTRATIVE REPRESENTATION MAY BE RECOVERED IN AN INDEPENDENT ACTION.

Since agencies which adjudicate Title VII complaints do not have authority to award attorney's fees, successful complainants must, as Section 1988 directs,[47] apply to the court for such an award. For the complainant who is successful in the administrative proceeding, and does not need to bring a federal court action on the merits, this application must be via an independent court action solely for the purpose of recovering fees. In *Carey*, this Court authorized such an independent action under Title VII:

> We agree with the District Court that the availability of a federal fee award for work done in state proceedings following EEOC referral and deferral should not depend upon whether the complainant ultimately finds it necessary to sue in federal court to obtain relief other than attorney's fees. But our agreement with the District Court compels us to reject its conclusion. It would be anomalous to award fees to the complainant who is unsuccessful in fulfilling Congress' plan that federal policies be vindicated at the state or local level. Since it is clear that Congress intended to authorize fee awards for work done in administrative proceedings, we must conclude that Section 706(f)(1)'s authorization of a civil suit in federal court encompasses a suit solely to obtain an award of attorney's fees for legal work done in state and local proceedings. 447 U.S. at 65-66.

The same anomalous consequences this Court rejected in *Carey* would occur under Section 1988 if fees for administrative representation depended upon whether by happenstance circumstances required the complainant to file a court action on the civil rights claim itself.

Petitioners' contend that the case of *Moor v. County of Alameda,* 411 U.S. 693 (1973)[48] supports their argument that no independent action can be brought to recover administrative attorney's fees. The cases cited by petitioner with *dicta* stating this argument also claim support in *Moor.*[49] However, a review of *Moor* shows that it dealt with an entirely different situation and *Moor* does not in fact support petitioners' argument. In *Moor,* the plaintiff attempted to bring a claim against a county for damages due to the actions of a deputy sheriff. At the time the claim was brought counties were immune from damage suits under 42 U.S.C. Section 1983 because they were not considered to be persons under Section 1983.[50] The *Moor* plaintiff tried to circumvent this limitation by attempting to base his claim on Section 1988, which in the

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47. Section 1988 provides that "the court may award . . ." fees (emphasis added).

48. Petitioners state that this issue is "subsumed" in the issue of whether fees are recoverable for administrative representation (other than administrative representation compensated due to its assisting related litigation) (Pet. Br. 23). However, petitioners then cite cases which stated in *dicta* that a successful administrative complainant could not bring an independent court action, even if the fees were otherwise recoverable.

49. Petitioners cite *Derheim v. Bur. of Soc. Ser.,* 524 F. Supp. 1321 (D. Minn. 1981), *aff'd on other grounds,* 688 F.2d 66 (8th Cir. 1982), *Estes v. Tuscaloosa County,* 696 F.2d 898 (11th Cir. 1983), and *Horacek v. Thone,* 710 F.2d 496 (8th Cir. 1983). These cases may be distinguished on the basis that the administrative proceedings in those cases were proceedings which were not concerned with enforcement of one of the provisions listed in Section 1988 and thus the fee claim did not meet the requirements of Section 1988.

50. This municipal immunity was subsequently removed by this Court's decision in *Monell v. New York City Dept. of Social Services,* 431 U.S. 658 (1976).

portion not dealing with attorney's fees instructs federal courts to use state law to supplement federal laws in determining damages for violations of federal civil rights, where such state remedies are not inconsistent with federal law. 411 U.S. at 703. The *Moor* plaintiff argued that since California law provided an action against municipalities, Section 1988 could be used to transform this state cause of action into a federal cause of action. It was this attempted use of Section 1988, to avoid the then existing immunity of municipalities, which this Court rejected in *Moor*.[51] And it was in this context that this Court stated that Section 1988 was "intended to complement the various acts which do create federal causes of action for the violation of federal civil rights." 411 U.S. at 702. In contrast to the plaintiff in *Moor*, respondents in this case do not seek to use Section 1988 to circumvent Section 1983 or any other federal law. Instead, they seek only the full remedies provided by Congress for violation of Title VI, remedies for which they did not previously have the opportunity to petition, since the administrative agency did not have the authority to award attorney's fees.[52]

Even if a court action is required to entitle a successful administrative complainant to attorney's fees, in this case such an action did occur in the *ECOS* case. During the negotiation of the settlement of the administrative complaint, petitioners submitted the final EIS for the

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51. The Court pointed out that incorporating this state cause of action would conflict with federal law, namely Section 1983, which then excluded municipalities.

52. That *Moor* does not address the issue of the availability of an independent court action for recovery of attorney's fees is further seen in the fact that at the time *Moor* was decided Section 1988 did not even contain an attorney's fee provision, which was enacted subsequently in 1976.

freeway to the federal court and moved to have dissolved the existing injunction, which prohibited construction of the freeway until the federal court approved the final EIS. At this point the administrative complaint had not been settled and respondents had no legally enforceable agreement with the petitioners regarding the freeway or the treatment of respondents' community.[53] Respondents therefore moved to intervene in the *ECOS* action, attaching to their motion a complaint raising their Title VI claims. Respondents and petitioners subsequently settled the administrative complaint by executing the final mitigation plan and they contemporaneously executed a consent judgment dismissing the *ECOS* action. Although the district court did not specifically rule on the motion to intervene, respondents were made parties to the action by their signing the consent judgment, which dismissed with prejudice their Title VI and other claims. Therefore, even if a court action is required to enable a successful complainant to recover attorney's fees for administrative representation, respondents participated in such an action and this requirement does not bar their claim for fees.[54]

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53. Functionally respondents were in the same position as the plaintiff in *Carey*. They were seeking to resolve the case administratively but had to file a court action to protect their interests in the event the case was not resolved administratively.

54. Finally, if this Court should conclude that attorney's fees are not recoverable for federal Title VI administrative proceedings, respondents are still entitled to recover fees for the portion of time spent on the administrative complaint which was useful and necessary to the federal court action. *Webb*, 105 S.Ct. at 1929. Given petitioners' concession that the substantial relief achieved by respondents was due to the administrative complaint and the fact that the identical issues were raised in both the administrative complaint and the court action, respondents would be entitled to recover fees for much of the

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CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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By: ALICE A. RATLIFF

June 1986

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time spent in the administrative proceeding and the case should be remanded for determination of this amount. In this case such hours would, at minimum, include the legal and factual research conducted, consultations with assisting experts and time spent regarding negotiations with the petitioners.

RESPONDENTS' APPENDIX

A. N. C. Department of Transportation Memorandum Re Meeting With Respondents ..... App. 1

B. Letter From Respondents' Attorney to Barry L. Del-Castilho and William F. Caddell ..... App. 4

C. N. C. Department of Transportation File Notes June 14, 1982 to September 7, 1982 ..... App. 6

(SEAL)
STATE OF NORTH CAROLINA
DEPARTMENT OF TRANSPORTATION
RALEIGH 27611

JAMES B. HUNT, JR.
GOVERNOR

WILLIAM R. ROBERSON, JR.
SECRETARY

DIVISION OF HIGHWAYS

FILE: Durham, East-West Freeway

SUBJECT: Meeting to Discuss Clarification of Mitigation Plan and Mechanism for Finalizing the Plan

A meeting was held on March 29, 1982 at the Durham City Hall. Attending were: Cecil Brown and Linda Del Castilho, representing the City of Durham; Bob Scott, representing the FHWA; Alice Ratliff and Mike Calhoun, representing the Crest St. neighborhood; and Bill Caddell, Louis Allen, Don Lambe, Jim Meade and Richard Smith representing the NCDOH. The purpose of the meeting was to discuss the proposed clarification changes to the mitigation plan and the mechanism for finalizing the plan.

The meeting was began by discussing the proposed changes in the mitigation plan. Linda passed out copies of the mitigation plan that had incorporated the changes requested by NCDOH at the meeting held 3-18-82. A copy of that plan is attached. After reviewing several individual changes, Mike expressed concern that the changes were

being made. He stated the mitigation plan had already been approved by the Crest St. Community Council and the Durham City Council and he saw no need to start making changes in that document. Everyone agreed that the final mitigation plan would contain clarification and details not contained in the presently approved plan; therefore, this "converted" mitigation plan could possibly be used as guidance in completing the final plan, but should not take the place of the presently approved plan. It was further agreed that the NCDOH would submit in writing their concerns and proposed clarification of the approved plan to the Crest St. representatives for their review and ultimate concurrence.

The next item discussed was regarding the proposal to send NCDOH representatives into the Community to inform the residents of the benefits relating to the mitigation plan. Louis Allen passed out draft copies of a "handout" which would be used in explaining the various benefits to the residents. After much discussion, the Crest St. representatives said they felt the information should be more specific and NCDOH should be in a position to tell each resident secifically (sic) what his or her options were. NCDOH specified information until more detailed information were available. At that point in the discussion NCDOH representatives said they understood that Crest St. had asked that the information be provided to the residents so that the neighborhood could give final approval to the mitigation plan prior to the preparation of the final EIS. Mike said it would be satisfactory to Crest St. to complete the EIS based on the mitigation plan that was approved by the city council. The state would have to agree not to present the EIS to the Court until the details of the plan

had been worked out & the residents had been informed of their specific options and approved the plan. Bill Caddell said he saw no problems with handling the plan in that manner. It was, therefore, agreed that the city would immediately conduct a survey of houses within the community that could be rehabilitated. It was felt this was necessary before the mitigation plan could be detailed enough for the EIS. Also, the information contained in the "Hartman Survey" would be obtained by the Crest St. representative from Carol Stack and provided to NCDOH. This would permit a relocation study report to be prepared which would be adequate for the EIS.

The NCDOH representatives asked the Crest St. representatives if they had any objections to the location survey crews being allowed to begin surveying within the neighborhood. They said they would not object to the crews starting their surveys April 5. They said they would inform the community of that start.

NCDOH representatives asked what boundaries should be shown in the EIS for the Crest St. neighborhood. It was agreed that the boundaries should be the same as those of the mitigation plan unless there is objection from the Crest St. Community. They (Crest St.) will let the NCDOH know their decision by April 2.

Subsequent to this meeting, Richard Smith met with Joe Creech and informed him the surveys could begin April 5. Joe was provided a list of names and addresses of the leaders of the Crest St. Community Council and their lawyers. He was also briefed as to the delicacy of the entire situation so that his staff could be told.

RFS/jc

NORTH CENTRAL LEGAL ASSISTANCE PROGRAM

June 11, 1982

Mr. Barry L. Del Castilho
City Manager
City of Durham
101 City Hall Plaza
Durham, North Carolina 27701

Mr. William F. Caddell, Jr.
Assistant State Highway Administrator
North Carolina Department of Transportation
Raleigh, North Carolina 27611

Dear Barry and Bill:

This letter is to confirm the agreement reached among the Crest Street Community, the City of Durham and the North Carolina Department of Transportation. This agreement was previously set out in my letter to the North Carolina Department of Transportation, dated April 20, 1982. However, the time table and procedures set out on page 2 of that letter were subsequently modified at our meeting on May 6. At that meeting it was agreed that it would not be necessary to prepare prior to the submission of the environmental impact statement a document setting forth more details of the mitigation plan. It was agreed instead that agreement on several basic issues would be reached and reduced to writing prior to submission of the environmental impact statement to the state planning board on May 17 and a final site plan and a document setting out the details of the mitigation plan will be prepared and agreed upon by the parties prior to submission of the environmental impact statement to the federal court. We met again on May 12 and at that time reached agreement on the general terms for the "soft second mortgage", the procedures for relocatable and rehabitable structures, the relo-

cation of the existing community store and the time table for implementation of the mitigation plan. I received from each of you letters confirming agreement on these general terms.

Main Office:

106 West Parrish St.
Post Office Box 2101
Durham, NC 27702
919-688-6396

Please let me know if there are any omissions or errors in the above summary of our agreement. I suggest that we meet together again soon to discuss the procedure and time table for preparations of the final site plan.

Sincerely,

Michael D. Calhoun
Staff Attorney

MDC/wmg

cc: Robert Scott
Linda Del Castilho
Richard Smith

N.C. DEPARTMENT OF TRANSPORTATION

FILE NOTES

JUNE 14, 1982 TO SEPTEMBER 7, 1982

June 14—Received letter from Crest St. Attorney confirming agreement reached on the mitigation plan and acknowledging letters of confirmation on agreement from City and NCDOH.

July 6—Met with representatives of City, Crest St. and FHWA. Purpose was to discuss remaining items that needed to be accomplished prior to implementation of the mitigation plan. It was determined that: 1-group meetings and individual meetings needed to be held with Crest St. residents, 2—the mitigation plan and municipal agreement needed to be finalized and approved by the City Council and Board of transportation and 3—the court injunction must be lifted.

July 12—Met with representatives of City, Crest St. and FHWA. Purpose was to discuss proposed meetings with Crest St. residents. Agreement was reached on a proposed handout that would be distributed at the meetings. City asked that DOT secretary write letter supporting the Section 202 Application. This was done on July 19.

July 15—A meeting was held with residents of the Crest St. Community. Purpose was to discuss the various benefits that would be available to them with the mitigation plan and permit them to schedule an appointment with personnel of NCDOH for individual interviews.

July 20—Met again with Crest St. residents for same purpose as July 15 meeting.

July 23—FEIS was approved and signed by FHWA Regional Administrator.

Aug. 4—FEIS transmitted to EPA.

Aug. 20—FEIS appeared in Federal Register.

Aug. 23—Met with representatives of City, Crest St. and FHWA. Purpose was to discuss results of individual meetings with Crest St. residents. The only problem encountered was the demand for one bedroom housing that is not being provided by the Section 8 housing. Also the status of the Section 202 housing was still uncertain.

Aug. 27—Met with representatives of City, Crest St., and FHWA. Purpose was to discuss ways to finalize site plan and resolve any other problems.

Sept. 7—Met with representatives of City, Crest St. & FHWA. Purpose was to discuss final site plan and problem of insufficient number of one bedroom units. It was determined that the one bedroom problem could be solved by use of the Section 8 Moderate Rehab. program of which the city already has 50 units targeted for the Crest St. neighborhood.